

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration

between

CITY OF PHILADELPHIA,

“City”

- and -

F.O.P. LODGE NO. 5,

“Union”
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AAA Case No.

14 390 00471 12

Opinion & Award

Re: Suspension of

Keith Baynes

Hearing: October 26, 2012

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT

Nicole S. Morris, Esq., Divisional Deputy City Solicitor

For the Union

JENNINGS SIGMOND, P.C.

Stephen J. Holroyd, Esq., Of Counsel

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City suspended Police Officer Keith Baynes for five days beginning July 25, 2012. It did so based upon one charge of "Conduct Unbecoming," alleging that on August 4, 2010, Baynes violated Section 1-§012-10 of the Police Department's Disciplinary Code by using excessive force towards a suspect who was then in custody. (Joint Exhibit 3 and City Exhibit 5.)¹ The Union contends the City lacked just cause to impose this suspension. It asks that the suspension be reversed and Baynes be made whole for all pay and benefits lost as a consequence of it.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

Baynes has been a member of the City's Police Department for over almost five years. He has no record of prior discipline.

The events that led to Baynes' suspension occurred on August 4, 2010. At approximately 3:30 p.m. that afternoon, Baynes, along with several other officers, responded to an assist officer call initiated by Police Officer J [REDACTED] W [REDACTED] relative to the apprehension of a suspect on possible narcotics or weapons charges. When Baynes arrived at the scene (i.e. 6900 block of Chelwynde Street), the suspect, R [REDACTED] B [REDACTED] was already in custody. He was handcuffed and standing behind a police "wagon" next to W [REDACTED] and Police Officers M [REDACTED] H [REDACTED] and D [REDACTED] C [REDACTED], who had assisted in his apprehension.

¹ Union counsel represented without challenge that the Department unilaterally implemented its current Disciplinary Code, effective May 1, 2010, and as such, it has not been accepted by the Union. (City Exhibit 5.)

² Baynes acknowledged that when interviewed by Internal Affairs concerning this incident, he described

Baynes testified he learned that B [REDACTED] had tossed something while being pursued by W [REDACTED], but had refused to provide any information regarding it when questioned by the other officers present. Concerned that the discarded item might have been narcotics or a weapon, and believing that B [REDACTED] might respond differently to him, he recounted that he approached B [REDACTED] and asked, "Why did you run, and what did you throw?"

Baynes related that as he asked this question, B [REDACTED] made a "sudden movement," which based upon his experience suggested an intent to flee. In response, Baynes stated he placed his hand on B [REDACTED]'s chest and pushed him.² He described this as a "control" hold.³ He also acknowledged that during this encounter he shoved B [REDACTED] by the back of his head. He maintained that none of his actions caused Bailey to make contact with the police "wagon."

Both H [REDACTED] and C [REDACTED], who were standing within a few feet of Baynes at the time, provided very similar accounts of this incident, which differed only slightly from Baynes's testimony. They both confirmed the questions Baynes asked B [REDACTED]. They also related that Baynes grabbed B [REDACTED] by his shirt near his neck or chin and pushed him towards the "wagon." Neither recalled Baynes pushing B [REDACTED]'s head into the "wagon." H [REDACTED] also stated that he did not observe B [REDACTED] make any sudden movements before Baynes grabbed him, while C [REDACTED] did not give any testimony on that issue.

² Baynes acknowledged that when interviewed by Internal Affairs concerning this incident, he described placing his hand in the area of B [REDACTED]'s throat. However, he denied choking him. (City Exhibits 2 & 6.)

³ Baynes averred that in securing control of a "situation," such as an encounter with a suspect, police officers are authorized to employ measures, as necessary and appropriate, along a "use-of-force continuum." According to Baynes, the continuum begins with the officer's mere presence and is followed by verbal commands. It then proceeds to physical restraint by the use of bodily force. From there, it escalates to non-lethal methods, such as pepper spray or a baton, and finally to lethal force.

Baynes testified that shortly after this encounter with B■■■■, he left the scene to respond to another radio call.

Later that same day, the circumstances of this incident came to the City's attention when the Department's Internal Affairs Division received a "complaint against police." submitted by Police Officer D■■■■ N■■■■ alleging that he had observed and videotaped officers physically abusing B■■■■.⁴ Lieutenant J■■■■ W■■■■, who investigated the complaint, testified that he ultimately concluded that Baynes had used excessive force in his interaction with B■■■■. He explained that on basis of his investigation, including his interviews of the witnesses and numerous viewings of the video recorded by N■■■■, he determined that Baynes' justification for his physical contact with B■■■■ (i.e., B■■■■'s sudden movement) was not credible. (City Exhibit 1 – 4 & 6.)⁵

On that basis, the Department charged Baynes with violating Disciplinary Code Section 1-§012-10, "Conduct Unbecoming – Unauthorized and/or Excessive Use of Force in Your Official Capacity."

Following a hearing, a Police Board of Inquiry ("PBI") found Baynes guilty of the charged offense. Consistent with the PBI's recommended penalty, the Department suspended Baynes for five days beginning July 25, 2011. (Joint Exhibit 3.)

This action prompted the instant grievance. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the

⁴ N■■■■'s complaint concerned the conduct of both Baynes and W■■■■. However, it is only the Department's disciplinary action against Baynes that is at issue in this case.

⁵ N■■■■ did not testify in this case. The Union, however, did not contest the authenticity or admissibility of the video recording. According to W■■■■, N■■■■ recorded the video from within his home looking out through a front window at a distance of approximately 60 feet from where B■■■■, Baynes, and the other officers were standing.

Union demanded arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case.

I held a hearing on October 26, 2012, at the offices of American Arbitration Association in Philadelphia. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I declared the hearing record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to suspend the grievant, Police Officer Keith Baynes for five days, effective July 25, 2011?
2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its suspension of Baynes was for just cause. It maintains that the evidence conclusively demonstrates his guilt on the Section 1-§012-10 charge of excessive use of force.

The City argues that the video and the testimony of H [REDACTED] and C [REDACTED], as well as Bayne's own admissions, confirm that he grabbed the prisoner, B [REDACTED], by the throat, and then shoved him against the back of the "wagon." It reasons further that the evidence reveals that Baynes had no legitimate reason to make physical contact with B [REDACTED]. It maintains that as the video shows, B [REDACTED] was not violent, resisting or engaging in any behavior that jeopardized the safety of B [REDACTED] or the other officers present.

It stresses that under these circumstances, Bayne's actions cannot be deemed to be the proper performance of his duties as a police officer. To the contrary, it submits that his conduct exceeded his proper authority and amounted to an excessive use of force.

In sum, it concludes that its responsibility to the public compels that it take appropriate disciplinary action against police officers found to have used excessive force. Therefore, having shown that Baynes' grabbing and shoving of B█████ was unwarranted, it plainly constituted just cause for the suspension imposed.

Accordingly, for all these reasons, it asks that the suspension be sustained and the grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to suspend Baynes based on the events of August 10, 2010. It submits that the City has failed to meet its burden of demonstrating that Baynes committed the charged offense; namely the unauthorized and/or excessive use of force against B█████.

With reference to the video, it asserts that the City's case amounts to a plea to "believe us, and not your lying eyes." It points out that the video does not show that Baynes choked B█████. Instead, it reveals only that he put his hand on B█████'s shirt, which was confirmed by both H█████ and C█████. Further, it stresses that Bayne's explanation for his physical contact with B█████ (i.e., he believed B█████ was about to make a sudden move) was entirely credible. It notes that his claim is buttressed by W█████'s reaction, who can be seen on the video responding simultaneously to an apparent move by B█████.

It also points out that unlike arresting officer W█████ who had to engage in a foot chase to apprehend B█████, Baynes had no reason to be frustrated with or hostile

toward B[REDACTED]. Instead, in approaching and questioning him, Baynes acted strictly to obtain information concerning the suspected contraband, which the other officers had been unsuccessful in getting him to disclose.

In sum, it submits that the record evidence, including, in particular, the video, does not even confirm an actual altercation between Baynes and B[REDACTED], let alone that Baynes used excessive force in interacting with him.

Accordingly, for these reasons, the Union asserts that its grievance should be granted, and the requested relief be awarded.

Opinion

There can be no question that the City's Police Department has a right and a duty to ensure that its officers adhere to certain standards of conduct when acting in their official capacity. The appropriate use of force is undoubtedly one area in which the enforcement of such standards is of paramount importance. The Department's obligation to safeguard the public, while also shielding itself from civil claims, demands as much. To this end, the Department has the indisputable right to discipline an officer who engages in the use of unauthorized and/or excessive force.

The City, of course, carries the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Baynes committed the charged offense. It must also establish that the level of discipline imposed is appropriate. The Union, on the other hand, has no corresponding burden. It need not disprove the charges against Baynes. Indeed, he is entitled to the presumption of innocence.

On review, the record convinces me that the City has not met its burden. My reasons for this conclusion follow.

If the evidence confirmed, as the City theorizes, that Baynes grabbed and shoved B[REDACTED] in a misguided effort to elicit information concerning the suspected contraband, his suspension would be unquestionably sustained. However, I conclude that the record is inconclusive in this regard.

I have carefully reviewed the video of Baynes' interaction with B[REDACTED] on which the City places great weight. Simply put, I do not find it to be dispositive of whether Baynes used excessive force towards B[REDACTED] or instead properly made physical contact to prevent him from making a sudden movement. Immediately before Baynes places his hand on B[REDACTED]'s chest or throat, B[REDACTED], who is partially obscured by W[REDACTED], is facing Baynes.⁶ The video, however, captures only an angled view of them in which B[REDACTED] has his back to the video camera. Therefore, it is not possible for me to conclude from the video that Baynes' explanation for his actions should be rejected as baseless. Stated otherwise, the video does not afford me the ability to see what Baynes observed in that moment before he made physical contact with B[REDACTED]; and therefore, does not provide me with sufficient basis to dismiss his otherwise plausible explanation.⁷

The testimony of H[REDACTED] and C[REDACTED] does not provide the necessary information to cure this critical deficiency in the video. Their accounts of the incident were extremely circumscribed. They simply related that Baynes questioned B[REDACTED] as to the reason he had run from W[REDACTED] and then grabbed his shirt near his neck or chin.

⁶ Given the degree to which B[REDACTED] is obscured by W[REDACTED] it is not possible to discern from the video precisely where Baynes placed his hand on him. It reveals only that it was between his chest and throat.

⁷ It should also be noted that on its face the video is lacking in certain important contextual information. Recorded from a distance of a distance of 60 feet, it does not include any audio of the words spoken between Baynes or B[REDACTED] or by the other officers standing in the immediate area. Such audio may well have provided important information concerning the trigger for Baynes' actions. Without it, the video leaves much to conjecture.

C [REDACTED] did not testify whether B [REDACTED] made or attempted a sudden movement immediately before Baynes made physical contact with him. H [REDACTED] stated only that he did not see B [REDACTED] do so. Moreover, at the critical moment, the video shows that H [REDACTED] was not facing B [REDACTED], but standing to the side of him. As such, he simply was not in position to confirm or refute what Baynes purportedly observed.⁸

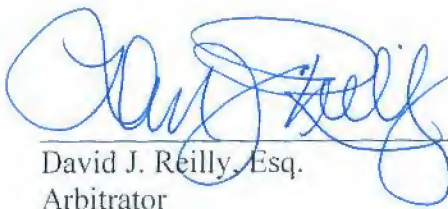
Accordingly, for all these reasons, the Union's grievance is granted.

⁸ The video indicates that two to three seconds elapsed from when Baynes approached and spoke to B [REDACTED] to the moment at which he makes physical contact with him. The entire encounter lasted approximately nine seconds.

AWARD

1. The grievance is granted.
2. The City did not have just cause to suspend Keith Baynes for five days, effective July 25, 2011.
3. The City will make Keith Baynes whole for all pay and benefits lost as a consequence of the five days for which he was suspended, beginning July 25, 2011 and continuing through and including July 29, 2011. I will retain jurisdiction of this matter to resolve any dispute as to the implementation of this award, including the monies to be paid to or on Keith Baynes' behalf in providing the make whole relief.
4. The Department will revise Keith Baynes' personnel record consistent with the terms of this award, including deleting all reference to the suspension from his disciplinary record.

November 20, 2012

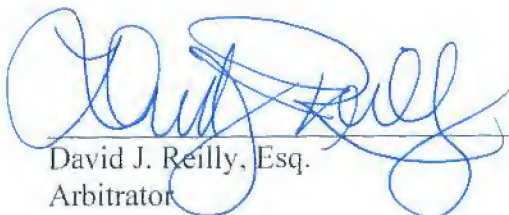


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

November 20, 2012



David J. Reilly, Esq.
Arbitrator